United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-1393

To be argued by
BARRY J. CUTLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1393

UNITED STATES OF AMERICA *ex rel.* EDGAR ACOSTA,
Appellee,

—v.—

JOHN J. NORTON, Warden, FCI, Danbury, Conn.,
Appellant.

Docket No. 74-1394

ROY GIORDANO,
Appellee,

—v.—

JOHN J. NORTON, Warden, FCI, Danbury, Conn.,
Appellant.

Docket No. 74-1407

UNITED STATES OF AMERICA *ex rel.* JAMES BIVONA,
Appellee,

—v.—

JOHN J. NORTON, Warden, FCI, Danbury, Conn.,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR THE APPELLANT

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Appellant.

BRIEF FOR THE APPELLANT

Statement of the Cases

These consolidated appeals are from judgments of the District Court for the District of Connecticut (Newman, *J.*) entered February 7, 1974, granting writs of habeas

corpus and ordering that Petitioners-Appellees be discharged from federal custody unless within sixty days the United States Board of Parole holds hearings to determine whether or not they should be released on parole.[1] By orders dated April 2, 1974, a panel of this Court (Hays, Oakes, Christensen[2]) granted Appellant's motions for stays pending appeal and denied without prejudice Appellees' motions for bail pending appeal.[3] Judge Newman's unreported decision is reproduced in Appellant's appendix at page 7a.

In *Acosta,* Judge Newman on October 19, 1973 directed the Appellant to show cause why habeas corpus relief should not be granted on Acosta's claim that he was then entitled to parole consideration in light of the repeal of 26 U.S.C. § 7237(d). See generally, *Bradley* v. *United States,* 410 U.S. 605 (1973); *Marrero* v. *Warden, Lewisburg Penitentiary,* 483 F.2d 656 (3d Cir. 1973), *cert. granted,* 42 U.S.L.W. 3381 (1974). After receiving the Government's response, and without holding an evidentiary hearing, Judge Newman filed a memorandum of decision granting habeas corpus relief in these three cases.[4] From the judgments entered thereupon, the Government appeals.

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[1] Judge Newman filed a single memorandum of decision to cover all three cases. Separate judgments were entered by the Clerk on February 7, 1974 and the Government has filed separate notices of appeal. By stipulation of the parties and with approval of the Court the three appeals have been consolidated.

[2] Senior District Judge of the District of Utah, sitting by designation.

[3] Upon subsequent applications in the District Court, Judge Newman granted Acosta's motion for enlargement pending appeal and denied similar motions by Bivona and Giordano.

[4] Apparently by oversight, the Government was not served with process or otherwise put on notice regarding the pendency of the *Bivona* and *Giordano* petitions until the consolidated decision was filed on February 5, 1974.

Statutes Involved

1 U.S.C. § 109:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

18 U.S.C. § 4202:

> A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

§ 1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1294:

> Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section . . . or abated by reason thereof.

26 U.S.C. § 7237(d), repealed effective May 1, 1971:

> (d) No suspension of sentence; no probation; etc.—Upon conviction—
>
> (1) of any offense the penalty for which is provided in subsection (b) of this section, sub-

> section (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended . . .

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code . . . as amended, shall not apply.

Question Presented[5]

Does the parole non-eligibility provision of 26 U.S.C. § 7237(d), repealed effective May 1, 1971, continue to apply to incarcerated narcotics offenders who were convicted under the former statute?

Statement of Facts

All three Appellees were, at the time of the filing of their respective petitions,[6] inmates at the Federal Correctional Institution at Danbury, Connecticut, having been convicted of varying narcotics offenses and having been sentenced pursuant to 26 U.S.C. § 7237(d), which, in addition to other sanctions, precluded parole consideration under 18 U.S.C. § 4202. The Comprehensive Drug Abuse

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[5] This identical issue is now pending before the United States Supreme Court in *Marrero v. Warden, Lewisburg Penitentiary*, 483 F.2d 656 (3d Cir. 1973), *cert. granted*, 42 U.S.L.W. 3381 (January 7, 1974). Oral argument was held during the last week in April, 1974. Since the opinion of the Third Circuit in *Marrero* sets forth the legal issues in sufficient detail and with sufficient clarity, and since the Supreme Court presumably is about to decide the issue, little is served by exhaustive briefs at this time. The main objective of Government counsel in this brief has been to summarize for this Court the major arguments set forth in the Solicitor General's brief in *Marrero*.

[6] Appellee Acosta was released on bail pending appeal by order of Judge Newman dated April 18, 1974.

Prevention and Control Act of 1970 effectively repealed § 7237(d) as of May 1, 1971. Under the present statutory scheme, many but not all narcotic offenders are eligible for parole consideration during their incarceration. Because Section 1103(a) of the 1970 Act provided that "(p)rosecutions for any violation of law occurring prior to [May 1, 1971] shall not be affected by the repeals or amendments made by [the 1970 Act] . . . or abated by reason thereof," many federal inmates are presently serving sentences imposed under the now-repealed statute, with its non-parole provisions. The policy of the Bureau of Prisons and the Board of Parole has been not to afford parole hearings to those inmates sentenced under § 7237(d).

Appellee Acosta was convicted of selling cocaine without a written order form, in violation of 26 U.S.C. § 4705(a). He was sentenced on March 9, 1971 to a term of five years and, but for Judge Newman's order admitting him to bail pending appeal, he would have reached his mandatory release date in May, 1974.

Appellee Giordano was sentenced on January 17, 1972 to a five-year term after a plea of guilty to an unlawful heroin transaction, in violation of 21 U.S.C. §§ 173 and 174. He has served more than one-third of his sentence and would be immediately eligible for parole were this Court here, or the Supreme Court in *Marrero,* to rule that the class of inmates to which the Appellees belong are eligible for consideration under 18 U.S.C. § 4202.

Appellee Bivona was sentenced on January 18, 1973 to concurrent terms of five years for selling and conspiring to sell cocaine without a written order form, in violation of 26 U.S.C. § 4705(a). He has not yet served one-third of his sentence and, in a ruling on Bivona's motion for bail pending appeal filed on May 7, 1974, Judge Newman suggested that "his petition should have been dismissed" for

lack of standing. But see *Peyton* v. *Rowe*, 391 U.S. 54 (1968).[7]

Because the Board of Parole and the Bureau of Prisons attribute enduring vitality of the parole non-eligibility of former 26 U.S.C. § 7237(d), and in Bivona's case because he has not yet served one-third of his sentence, none of the appellees has been considered for release on parole.

ARGUMENT

Under the Savings Provisions of 1 U.S.C. § 109 and § 1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, persons convicted under the non-parole provision of former 26 U.S.C. § 7237(d) remain ineligible for parole.

When Congress repealed 26 U.S.C. § 7237(d), effective May 1, 1971, the question of the continued applicability of that section to initiated or completed prosecutions required referral to either of two "savings" provisions. The first is Section 1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1294, which provides that "prosecutions" for any violation occurring prior to May 1, 1971 shall not be affected by the repeal of the old statute. The second provision is 1 U.S.C. § 109, a general "savings" statute, which provides in relevant

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[7] This was one of the two petitions of which the Government had no notice. See footnote 4, *supra*. Nevertheless, since the thrust of the Government's argument will be that this Court should hold the appeals in abeyance pending a decision by the Supreme Court in *Marrero*, and since Bivona will reach the one-third point of his sentence in relatively short order, the Government does not seek a remand of Bivona's action to the District Court since neither any litigative interest of the Government nor any interest of judicial economy would be forwarded by such a procedural step. The Government will merely suggest to the Court that this situation presents a strong basis to hold the appeal in abeyance, allowing Bivona's rights to be protected by the doctrine of *stare decisis*.

part that "the repeal of any statute shall not . . . extinguish any penalty . . . or liability incurred under the statute."

Thus, the precise question before this Court is whether the repealed parole ineligibility provisions of the 1956 Act constituted either part of the "prosecution" or a "penalty". If either prong of the question is answered in the affirmative, the Appellees in this case remain ineligible for parole and the judgments below must be reversed. It is submitted that the Appellees are ineligible for parole under either prong of the test.

A. The *"Penalty"* Test

It is submitted that the parole ineligibility incurred under repealed 26 U.S.C. § 7237(d) is clearly a "penalty" within the meaning of 1 U.S.C. § 109, and therefore that Appellees remain ineligible for parole under that aspect of the test. Such a result follows from the legislative history of the 1956 Act and of the 1970 Act, and by analogy to recent case law regarding Rule 11 of the Federal Rules of Criminal Procedure.

The legislative history of the Narcotic Control Act of 1956 shows that denial of parole was part of the method Congress chose to punish the narcotics trafficker severely. After extensive hearings, the Subcommittee on Narcotics of the House Committee on Ways and Means concluded:

> "Effective control of the vicious narcotic traffic requires not only vigorous enforcement but also certainty of punishment. Conclusive evidence was presented during your subcommittee's investigation that the imposition of heavier penalties was the strongest deterrent to narcotic addiction and narcotic traffic. In those areas of the country where we found leniency in sentencing the prevailing practice, drug addiction and narcotic traffic without exception are on the increase. Also without exception, wherever

heavier penalties are imposed by the courts, narcotic traffic and addiction are at a virtual minimum or nonexistent.

"However, it must be recognized that special incentives in our penal systems serve to decrease the actual time spent in a penal institution under a sentence imposed by the court. The violator is eligible for parole after serving one-third of his sentence. As is true of all Federal violators, he is subject to conditional release after serving two-thirds of his sentence. Available data from the Bureau of Prisons indicate that a narcotic violator actually serves an average of less than two-thirds of the sentence imposed by the court. This tends to defeat the purposes of the act and should be corrected as set forth in the subcommittee recommendations." [8]

Thus § 7237(d) represented a clear and positive decision by Congress in 1956 to make the absolute prohibition against parole an inherent element of the penalty imposed on the narcotic trafficker, and under 1 U.S.C. § 109, it therefore survived the enactment of the contrary provisions of the 1970 law.

The legislative history of the 1970 Act provides no basis to speculate that the Congress had had second thoughts about the severity of the no-parole provisions of the 1956 Act. While the 1970 Act did allow a more flexible approach to sentencing in narcotics cases—primarily for "individual" abusers—the purpose of the new sentencing provisions was not to benefit previously incarcerated narcotics offenders, but to increase the likelihood that those engaging in future unlawful trafficking would be prosecuted and convicted. Elaborating on the Act's approach to penalties, the House Report stated:

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[8] H. Rep. No. 2388, to accompany H.R. 11619, 84th Cong., 2d Sess., pp. 63-64.

"The foregoing sentencing procedures give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case.

"The severity of existing penalties, . . . have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences."[9]

It would be inconsistent with this approach to infer a congressional intent to permit those already convicted of violations of the 1956 Act to benefit from the more lenient provisions of the 1970 Act. The purpose of the more lenient sentencing provisions of the 1970 Act was clearly to facilitate convictions in cases brought under the new Act.

Finally, it is submitted that federal courts, in collateral attacks on convictions based on guilty pleas, have tended to regard the non-eligibility for parole in the nature of a "penalty". See *Bye* v. *United States*, 435 F.2d 177 (2d Cir. 1970) and cases cited therein, *Id.* at 181. Although this Court held only that non-eligibility was a "consequence" of the guilty plea, the panel recognized that the provision constituted a policy of Congress to impose a "more serious punishment", *Id.* at 180, n. 6, and concluded

[9] H. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess., p. 11.

that, for purposes of Rule 11, the ineligibility represented a qualitatively different consequence of a guilty plea from those for which no express acknowledgement was necessary. It is submitted that the thinking reflected in the *Bye* and related decisions strongly supports the conclusion that non-eligibility for parole is a "penalty" within the meaning of 1 U.S.C. § 109.

It is submitted that, in view of the legislative history of the repealed and superseding Acts, and the treatment which a majority of federal courts have given to parole non-eligibility, this Court should adopt the views of Justices White and Brennan in *Bradley* v. *United States*, 410 U.S. 605, 612 (1973) (*dictum*) and hold that 1 U.S.C. § 109 preserves the non-eligibility provision for those sentenced under 26 U.S.C. § 7237(d).

B. The "*Prosecution*" Test

Even were the Court to reject the argument based on the general savings statute, it is submitted that Section 1103(a) of the 1970 Act itself preserves parole ineligibility for incarcerated narcotics offenders. Such a result follows by analogy to *Bradley* v. *United States, supra.*

Bradley held that the determination of parole eligibility under 18 U.S.C. § 4208(a) is part of the sentencing process, and thus part of the "prosecution" saved by Section 1103 (a), the decision concerning when an offender will become eligible for parole is made by the judge at the time of sentencing. *Id.* at 610-611. But viewed pragmatically, the decision when an offender will become eligible for parole under 18 U.S.C. § 4202 is also fixed at the time of sentencing. To be sure, under § 4208(a) the decision is made *explicitly* by the Court as part of the sentence, while under § 4202 the decision is made *implicitly* by fixing the maximum length of the sentence. Nevertheless, parole eligibility under either section is determined at the time of sen-

tencing. Under *Bradley,* this is part of the prosecution saved by Section 1103(a).

Finally, perhaps the strongest argument that parole ineligibility is part of the "sentencing", and therefore part of the "prosecution", comes from a pragmatic view of the factors which a district judge is likely to rely upon in imposing sentence. This Court may fairly assume that eligibility for parole is a weighty component in the decision by a district judge to impose a particular sentence. It is probably not a coincidence, for example, that the three Appellees now before the Court received the minimum sentences allowed under 26 U.S.C. § 7237(b). While it is impossible to determine on the present state of the record whether any of the Appellees would have received longer sentences had the respective district courts considered the ordinary one-third parole provision of 18 U.S.C. § 4202, it is hard to conceive that any conscientious sentencing judge would not have taken parole ineligibility into account in imposing any adult sentence, much less a sentence where Congress has provided a mandatory minimum.

Such a recognition of the realities of sentencing, coupled with the lack of any legislative intent to the contrary, strongly suggests that *Bradley* should be extended to a holding that parole eligibility is part of the "prosecution" and therefore that the non-eligibility provision of the 1956 Act is saved by Section 1103(a) of the 1970 Act.

CONCLUSION

It is submitted that parole non-eligibility under former 26 U.S.C. §7237(d) is either part of the "prosecution" or part of the "penalty", and that, in either or both cases, it continues to apply to incarcerated narcotics offenders sentenced under §7237(d) of the 1956 Act. It is therefore submitted that the judgments of the District Court should be reversed.

Respectfully submitted,

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BARRY J. CUTLER
Assistant United States Attorney

APPENDIX

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I. Acosta Docket Entries

Date *Proceedings*

1973

10/19—Order to File Answer, filed and entered. Ordered that respondent file an answer on or before November 5, 1973; that service by Marshal of Order, together with a copy of verified petition be made on U. S. Attorney on or before October 26, 1973; and that related documents be filed without payment of statutory filing fee. Newman, J.M.—10/25/73 Copy to Attorney.

10/19—Memorandum of Law for Petitioner, filed.

10/19—Affidavit, filed by Atty. Ginsberg for petitioner.

10/31—Government's Response to Order to File Answer, filed.

11/27—Affidavit in Opposition (to Government's Response to Order to File Answer), filed by attorney for petitioner.

1974

1/8 —Government's Response in Opposition to Application for Writ of Habeas Corpus, filed. Sent. to Jan. 1/11/74.

2/5 —MEMORANDUM OF DECISION, filed and entered. NEWMAN, J. M-2/13/74. Ordered that a writ will issue discharging the petitioner from custody unless the Board holds a hearing within 60 days to determine whether he should be released on parole. This decision entitles the petitioner only to a parole hearing. It has no bearing upon the Board's ultimate determination of whether the peti-

I. Acosta Docket Entries

Date 1974	*Proceedings*
	tioner should be granted parole, nor does it affect the remedies available to the petitioner if the Board should decide after a hearing that he should not be released on parole. Copies sent Attys. Clifford, Bamberger and Cutler, Warden Norton, MJB, TEC, RCZ, JON, and AHL, also U. Conn. Law Review.
2/7	—JUDGMENT in accordance with Memorandum of Decision, filed and entered. MARKOWSKI, C. Copies to Attys. Clifford, Bamberger and Cutler and Warden Norton. (M-2/13/74).
2/22	—Notice of Appeal from the judgment discharging the petitioner from custody unless the Board of of Parole holds a hearing within 60 days, filed by respondent. Copies to counsel. Certified copy of Notice of Appeal and docket entries sent Clerk, U.S.C.A.
2/26	—Notice of Motion of renewal of motion for release on his own recognizance from the F.C.I., Danbury, Ct., pending appeal, filed by petitioner.
2/26	—Affidavit in Opposition, filed by Sheila Ginsberg, Esq., Legal Aid Society of N.Y.C., Federal Defender Services Appeals Unit, in support of the renewal of petitioner's motion for release on his own recognizance pending appeal.
2/26	—Notice of Motion of renewal of motion for release on his own recognizance from the F.C.I., Danbury, Ct., pending appeal, endorsed: "Motion denied; petitioner assumes the appeal stays this Court's Order, but no motion for a stay has been presented." Newman, J. M-2/26/74. Copies to counsel.

II. Giordano Docket Entries

Date	*Proceedings*
1974	
3/13	Respondent's Motion for Stay Pending Appeal, filed. (Respondent requests that the judgment be stayed pending decision by the Supreme Court in Marrero.)
3/19	ORDER, filed and entered. "Upon consideration of respondent's motion for a stay pending appeal, the motion is *denied,* and petitioners are granted leave to proceed on appeal in forma pauperis." Newman, *J.* M-3/20/74. Copies to Attys. Clifford, Ginsberg, Kasanof, Bamberger, Cutler, and J.O.N. (Actions B-74-46 and B-74-47 are included in this ORDER).

II. Giordano Docket Entries

1974	
2/5	—MEMORANDUM OF DECISION, filed and entered. Ordered that a writ will issue discharging the petitioner from custody unless the Board holds a hearing within 60 days to determine whether he should be released on parole. This decision entitles the petitioner only to a parole hearing. It has no bearing upon the Board's ultimate determination of whether the petitioner should be granted parole, nor does it affect the remedies available to the petitioner if the Board should decide after a hearing that he should not be released on parole; that papers may be filed without fee. NEWMAN, J. Copies sent Petitioner, U. S. Attorney, and Warden Norton, MJB, TEC, RCZ, JON, AND AHL, and U. Conn. M-2/13/74.

II. Giordano Docket Entries

Date	*Proceedings*
1974	
2/5	—Motion For Permission To Proceed In Forma Pauperis And For The Appointment of Counsel, filed together with Affidavit In Support Of Motion To Proceed In Forma Pauperis and Application In The Nature Of A Writ Of Habeas Corpus Or, In The Alternative, Writ Of Mandamus, For Declaratory And Injunctive Relief. Copies to U. S. Atty. and Warden Norton.
2/7	—Judgment in accordance with Memorandum of Decision, filed and entered. MARKOWSKI, C. Copies to Petitioner, U.S. Attorney, Warden Norton. M-2/13/74.
3/13	—Notice of Appeal, filed by Respondent. (Appeal from the judgment discharging petitioner from custody unless the Board of Parole holds a hearing within 60 days to determine whether he should be released on parole, entered 2/7/74.) Copy to petitioner.
3/13	—Respondent's Motion for Stay Pending Appeal, filed. (Respondent requests that the judgment be stayed pending decision by the Supreme Court in *Marrero.*)
3/14	—Certified copy of Notice of Appeal and Docket Entries sent Clerk, USCA.
3/19	—ORDER, filed and entered, Newman, J. "Upon consideration of respondent's motion for a stay pending appeal, the motion is denied, and petitioners are granted leave to proceed on appeal in forma pauperis." M-3/20/74. Copies to Attys. Clifford, Kasanof, Bamberger, Ginsberg (who are listed in civil numbers B-899 and B-74-46 and this Order incorporates all three actions(Asst. U. S. Atty. Cutler and to petitioner, and to JON.

III. Bivona Docket Entries

Date	*Proceedings*
1974	
2/5	—MEMORANDUM OF DECISION, filed and entered. Ordered that a writ will issue discharging the petitioner from custody unless the Board holds a hearing within 60 days to determine whether he should be released on parole. This decision entitles the petitioner only to a parole hearing. It has no bearing upon the Board's ultimate determination of whether the petitioner should be granted parole, nor does it affect the remedies available to the petitioner if the Board should decide after a hearing that he should not be released on parole, that papers may be filed without fee. Copies sent Attys. Clifford, Bamberger, U.S. Atty., Warden Norton, MJB, TEC, RCZ, JON, AHL; U. Conn. NEWMAN, J. M-2/13/74.
2/5	—Memorandum Of Law For Petitioner, filed. Copies to U.S. Atty. and Warden Norton.
2/5	—Affidavit of Phylis Skloot Bamberger, filed. Copies to U. S. Atty. and Warden Norton.
2/7	—Judgment in accordance with Memorandum of Decision, filed and entered. MARKOWSKI, C. M-2/13/74. Copies sent Attys. Clifford, Bamberger, U.S. Atty., and Warden Norton.
3/13	—Respondent's Motion for Stay Pending Appeal, filed. (Respondent requests that the judgment be stayed pending decision by the Supreme Court in *Marrero.*)
3/13	—Respondent's Notice of Appeal, filed. (Appeal from the judgment discharging petitioner from custody unless the Board of Parole holds a hearing within 60 days to determine whether he should be released on parole, entered 2/7/74. Copies to counsel of record.

III. Bivona Docket Entries

Date	*Proceedings*
1974	
3/14	Certified copy of Notice of Appeal and Docket Entries sent Clerk, U.S.C.A.
3/19	ORDER, filed and entered, Newman, J. "Upon consideration of respondent's motion for a stay pending appeal, the motion is denied, and petitioners are granted leave to proceed on appeal in forma pauperis." M-3/20/74. Copies to Attys. Clifford, Kasanof, Bamberger, Ginsberg, Cutler and to JON. (Actions Civil B-74-47 and B-899 are included in this Order.)

IV. Memorandum of Decision of the District Court (Newman, J.) Filed February 5, 1974

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-899

UNITED STATES OF AMERICA *ex rel.* EDGAR ACOSTA

—v.—

JOHN J. NORTON, Warden, Federal Correctional Institution, Danbury, Connecticut

Civil No. B 74-46

UNITED STATES OF AMERICA *ex rel.* JAMES BIVONA

—v.—

JOHN J. NORTON, Warden, Federal Correctional Institution, Danbury, Connecticut

Civil No. B 74-47

ROY GIORDANO

—v.—

JOHN J. NORTON, Warden, Federal Correctional Institution, Danbury, Connecticut, Et Al.

Petitioners, inmates at the Federal Correctional Institution at Danbury, challenge the refusal of the United States Board of Parole (hereafter "Board") to consider them for parole. The issue is whether persons who were convicted for violating former narcotics laws and sentenced

IV. Memorandum of Decision of the District Court (Newman, J.) Filed February 5, 1974

pursuant to 26 U.S.C. § 7237(d),[1] which precluded parole consideration, are now eligible for parole since the parole ineligibility provision of § 7237(d) was effectively repealed on May 1, 1971.[2] Since petitioners have sued the Warden at the Federal Correctional Institution, Danbury, seeking release from custody unless the Board grants each of them a parole hearing, their petitions properly invoke the habeas corpus jurisdiction of this Court.[3] 28 U.S.C. § 2241. See *Amaya* v. *United States Bd. of Parole*, — F.2d — (5th

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[1] Prior to its repeal, 26 U.S.C. § 7237(d) stated:

"Upon conviction——

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or (2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense, the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of Title 18, United States Code . . . shall not apply."

[2] On October 27, 1970, 26 U.S.C. § 7237(d) was repealed by Pub. L. No. 91-513, Title III, § 1101(b)(4)(A), 84 Stat. 1292. Pursuant to § 1105(a), the repeal of § 7237(d) did not become effective until May 1, 1971.

[3] Although petitioner Giordano purports to state five separate causes of action and to seek mandamus relief as well as declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, his petition indicates that he is primarily seeking habeas corpus relief from the Board's refusal to consider his applications for parole because he was sentenced under § 7237(d) and has been classified by the Board as ineligible for § 4202 parole. Since the issues raised in each of petitioner Giordano's five separate causes of action all stem from the Board's refusal to consider him eligible for parole, petitioner Giordano's claims will be fully considered if this Court simply treats his complaint as a habeas corpus petition seeking relief from the Board's refusal to consider him eligible for parole under § 4202.

IV. Memorandum of Decision of the District Court (Newman, J.) Filed February 5, 1974

Cir. Nov. 9, 1973) (habeas corpus relief more appropriate than mandamus action to review Parole Board's decision as to parole eligibility); *United States ex rel. Marrero* v. *Warden, Lewisburg Penitentiary*, 483 F.2d 656, 658-59 (3d Cir. 1973); *Battle* v. *Norton*, 365 F. Supp. 925, 927-28 (D. Conn. 1973).

On January 17, 1972, petitioner Giordano was sentenced to a five-year term of imprisonment after he pleaded guilty to an indictment charging him with violating 21 U.S.C. §§ 173 and 174 by receiving, concealing, selling and facilitating the transportation, concealment and sale of heroin hydrochloride. Although petitioner has already served more than one-third of his total sentence, he alleged that his numerous requests for a parole hearing pursuant to 18 U.S.C. § 4202 have been denied because the Board classifies him ineligible for parole under the former restrictive sentencing provisions of 26 U.S.C. § 7237(d), rather than considering him eligible for parole under the more lenient sentencing provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (hereafter "Drug Control Act"), Pub. L. No. 91-513, 84 Stat. 1236.

On March 9, 1971, petitioner Acosta was convicted for unlawfully selling cocaine without a written order form in violation of 26 U.S.C. §§ 4705(a) and 7237(b). He has served more than one-third of his mandatory minimum five-year sentence and is scheduled for mandatory release in May, 1974.

Petitioner Bivona was convicted for violating 26 U.S.C. §§ 4705(a) and 7237(b) and 18 U.S.C. § 2 by selling and conspiring to sell cocaine without a written order form. On January 18, 1973, he was sentenced to concurrent terms of five years on each count. When he submitted his petition to this Court in October, 1973, petitioner indicated that he

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already had served more than eighteen months of his five-year concurrent sentences because he is entitled to credit for time spent in custody prior to his trial for these offenses. Since approximately three months have passed since petitioner addressed his petition to this Court, he has undoubtedly now served more than one-third of his total sentence.

Although petitioners Acosta and Bivona have not applied for parole, an inquiry by their attorney to the Office of Counsel for the Bureau of Prisons has produced written confirmation of the Board's policy, stating:

> "It is the interpretation of the Department of Justice of the recent Supreme Court case *Bradley* v. *U.S.* . . . that persons convicted under former narcotics laws, who were not previously eligible for parole, remain ineligible for parole, both under 18 U.S.C. 4208(a), [and] 4202."

Since the Board has adopted a firm position that persons sentenced in this judicial district for violating the repealed narcotics laws are ineligible for parole under § 4202,[4] it

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[4] In *Bradley* v. *United States*, 410 U.S. 605, 610, n. 5 (1973), the Supreme Court noted that the Board does not apply the no-parole rule to deny § 4202 parole to offenders of the former narcotic laws who were sentenced in the Seventh and Ninth Circuits since those Circuits had held that the parole ineligibility provisions of § 7237(d) were repealed by the Drug Control Act. *See United States* v. *Stephens*, 449 F.2d 103 (9th Cir. 1971); *United States* v. *McGarr*, [illegible] F.2d 1 (7th Cir. 1972). Presumably, the Board has also abandoned the application of the no-parole rule in the Third and Fifth Circuits as well as in the D.C. Circuit since recent decisions in those Circuits have also held that the no-parole rule in § 7237(d) does not preclude § 4202 parole. *See United States ex rel. Marrero* v. *Warden, Lewisburg Penitentiary*, 483 F.2d 656 (3d Cir. 1973); *Amaya* v. *United States Bd. of Parole*, — F.2d — (5th Cir. Nov. 9, 1973); *United States* v. *Marshall*, 485 F.2d 1063 (D.C. Cir. 1973).

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would be futile to require petitioners Acosta and Bivona to exhaust their administrative remedies by applying to the Board for a parole hearing. *Marrero* v. *Warden, supra,* 483 F.2d at 659. Administrative remedies also are not realistically available to petitioner Giordano since the hearing examiners at the Federal Correctional Institution, Danbury, have invoked the Board's firm policy to reject his numerous applications for a parole hearing. Consequently, it would be of no avail to require him to apply to the Regional Review Member or to the Appellate Board for administrative relief.

Section 1103(a) of the Drug Control Act was enacted to avoid the abatement of all prosecutions for violation of the former narcotics laws which had not reached final disposition before the effective date of their repeal on May 1, 1971. This specific savings clause provides in pertinent part:

> "Prosecutions for any violation of law occurring prior to the effective date of section 1101 . . . shall not be affected by the repeals or amendments made by such section or section 1102 . . . or abated by reason thereof."

When interpreting the word "prosecution" as used in § 1103(a), the Supreme Court stated that "[i]n the legal sense, a prosecution terminates only when sentence is imposed." *Bradley* v. *United States,* 410 U.S. 605, 609 (1973). Section 1103(a) was construed to preserve the limitations of § 7237(d) that prohibit the suspension of sentence and the granting of probation for offenders of the repealed narcotics laws. The Court reasoned that the decision to suspend an offender's sentence or to place him on probation ordinarily is made by the district court judge during sentencing before the prosecution has terminated. *Id.* at 609-10.

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Similarly, the Court held that under § 1103(a) a district judge must abide by the no-parole rule of § 7237(d) and cannot specify at the time of sentencing that the offender may be eligible for *early* parole pursuant to 18 U.S.C. § 4208(a) since that provision specifically states that the decision to make early parole available must be made "[u]pon entering a judgment of conviction," which occurs before the prosecution has ended. *Id.* at 611. However, the Court expressly stated that its decision in *Bradley* "has no bearing on the power of the Board of Parole to consider parole eligibility . . . under 18 U.S.C. § 4202" because "the decision to grant parole under § 4202 lies with the Board of Parole, not with the District Judge, and must be made long after sentence has been entered and the prosecution terminated." *Id.* at 610 n. 5 and 611 n. 6.

Relying upon this statement in *Bradley* and upon the Court's prior statement in *Morrissey* v. *Brewer,* 408 U.S. 471, 480 (1972), that "parole [under § 4202] arises after the end of the criminal prosecution, including the imposition of sentence," petitioners contend that § 1103(a) does not bar their eligibility for parole. They argue that the decision to grant parole after an offender has served one-third of his sentence is strictly an administrative decision made after "prosecution" has terminated with the imposition of sentence. They also argue that, unlike the suspension of sentence, a grant of administrative parole under § 4202 neither modifies the sentence imposed upon an offender of the former narcotics laws nor terminates his post-sentence custody. The defendant, on the other hand, adopts the position assumed by Justices Brennan and White in *Bradley* v. *United States, supra,* 410 U.S. at 611-12, and asserts that the no-parole rule of § 7237(d) is preserved by the general federal savings statute, 1 U.S.C. § 109, because it is a "penalty" which has not been expressly repealed by the Drug Control Act. Section 109 states:

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> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

Earlier, in *Ross* v. *United States,* 464 F.2d 376, 379 (2d Cir. 1972), the Court of Appeals had stated that it could not "accept the . . . reasoning that the grant of probation or parole, which was not possible under § 7327(d), is not a release or extinguishment of a penalty" within the meaning of 1 U.S.C. § 109. Relying upon its dicta in *Ross,* the Court of Appeals also had held that the no-parole rule of § 7237(d) was part of the sentencing process. *United States* v. *De Simone,* 468 F.2d 1196, 1198 (2d Cir. 1972), *cert. denied,* — U.S. — (1973). However, it subsequently decided that in light of *Bradley,* which had indicated that the decision to grant parole pursuant to § 4202 differs from a determination to grant early parole under § 4208(a)(2) because it is made by an administrative board after sentence has been imposed, "*any* previous expressions of ours on this subject cannot be regarded as controlling." *United States* v. *Huguet,* 481 F.2d 888, 891 (2d Cir. 1973) (emphasis added). Consequently, in this Circuit, it is now an open question whether the specific savings clause in § 1103(a) of the Drug Control Act and the general federal savings clause in 1 U.S.C. § 109 preserve the application of the no-parole rule in § 7237(d) to parole decisions under § 4202.

Prior to adopting the same position in *Bradley,* the Supreme Court stated in *Morrissey* v. *United States, supra,* 408 U.S. at 480, that "parole [under § 4202] arises after the end of the criminal prosecution, including the imposi-

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tion of sentence." This statement was buttressed by characterization of parole under § 4202 as an administrative process encouraging the rehabilitation of convicted criminals by enabling them to reintegrate into society while they are still serving the remainder of their sentence. *Id.* at 477-80. Interpreting the word "prosecution" in § 1103(a) to encompass the grant of parole pursuant to § 4202 would contradict the Supreme Court's characterization of parole as an administrative process which (a) occurs after a prosecution has ended with sentencing, and (b) promotes rehabilitation without terminating or modifying a convicted criminal's sentence or releasing him from federal custody and control. Consequently, this Court concludes, as have five Courts of Appeals, that the specific savings clause in § 1103 (a) of the Drug Control Act does not preclude the Board from granting parole under § 4202 to persons who were convicted of violating the former narcotics laws and sentenced pursuant to § 7237(d). See *United States* v. *Stephens,* 449 F.2d 103, 105 (9th Cir. 1971); *United States* v. *McGarr,* 461 F.2d 1, 3 (7th Cir. 1972); *Amaya* v. *United States Bd. of Parole, supra; Marrero* v. *Warden, supra,* 483 F.2d at 661-62; *United States* v. *Marshall,* 485 F.2d 1063 (D.C. Cir. 1973).[5]

Whether the general savings clause, 1 U.S.C. § 109, precludes § 4202 parole eligibility is a closer question. The issue is whether the no-parole rule in § 7237(d) is a "penalty" within the meaning of § 109. The Court of Appeals

[5] The Seventh and Ninth Circuits concluded that the no-parole rule of § 7237(d) was not preserved by § 1103(a) of the Drug Control Act because a "prosecution" ends with judgment rather than with sentencing. Although the Supreme Court's ruling in *Bradley* rejects this interpretation of the word "prosecution," it is unlikely that the Seventh and Ninth Circuits will depart from their position that the no-parole rule is not preserved by § 1103(a).

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was undoubtedly correct in observing in *Ross* v. *United States, supra,* 464 F.2d at 379, that a convicted criminal would view the unvailability of parole under § 7237(d) as a penalty. But the issue is not whether parole ineligibility is perceived as a penalty by a prisoner, but whether the purposes of § 109 and the new drug laws are served by considering this consequence to be preserved by § 109. The Supreme Court has stated that "the essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey* v. *United States, supra,* 408 U.S. at 477. The Board's authority to grant or deny parole pursuant to § 4202 is part of the administrative machinery designed to promote rehabilitation of a criminal by affecting the conditions of his confinement without modifying or terminating the sentence legally imposed by the sentencing court as the "penalty" or "punishment" for his offense. There is no sound reason to view the unavailability of such administrative machinery as a "penalty" which is preserved by § 109. *Amaya* v. *United States Bd. of Parole, supra; Marrero* v. *Warden, supra,* 483 F.2d at 663; *United States* v. *McGarr, supra,* 461 F.2d at 4-5; *United States* v. *Stephens, supra,* 449 F.2d at 105-06; *Contra Perea* v. *United States,* 480 F.2d 608, 609 (10th Cir. 1973). Surely § 109 does not bar prisoners sentenced under the former law from any administrative improvements the Bureau of Prisons may make as to the conditions of confinement. While parole is obviously a major change in the conditions of confinement, it is still not a change in the penalty imposed by the sentencing court. Furthermore, since the availability of § 4202 parole will hopefully encourage rehabilitation among narcotics offenders, it would not be consistent with the ameliorating purpose of the Drug Control Act to characterize the no-parole rule of § 7237(d) as a "penalty" which is preserved by § 109. See *Marrero*

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v. *Warden, supra,* 483 F.2d at 663; *United States* v. *Marshall, supra,* 485 F.2d at 1066.

Since neither § 1103(a) of the Drug Control Act nor 1 U.S.C. § 109 precludes § 4202 parole eligibility for narcotics offenders who were sentenced under the repealed sentencing provisions in § 7237(d), each petitioner is eligible to be considered for parole. Accordingly, writs will issue discharging petitioners from custody unless the Board holds hearings within sixty days to determine whether they should be released on parole. This decision entitles each petitioner only to a parole hearing. It has no bearing upon the Board's ultimate determination of whether each petitioner should be granted parole, nor does it affect the remedies available to a petitioner if the Board should decide after a hearing that he should not be released on parole.

The papers of petitioners Bivona and Giordano may be filed without fee.

Dated at New Haven, Connecticut, this 5 day of February, 1974.

Jon O. Newman
United States District Judge

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AFFIDAVIT OF SERVICE BY MAIL

State of New York

County of Kings

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 20th day of May, 1974, deponent served the within Brief and Appendix upon Dennis E. Curtis, Esq.; 127 Wall Street, New Haven Conn. 06520

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Attorney(s) for the Appellees in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 20th day of May 1974

William A. McKaigney

WILLIAM A. McKAIGNEY
Notary Public, State of New York
No. 41-7846700
Qualified in Queens County
Certificate filed in Kings County
Commission Expires March 30, 1976